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Justice Holmes and concurred in by the Chief Justice and Justices Van Devanter and McReynolds suggests that in a flagrant case of assessment on the basis of wealth a majority would be opposed. Mr. Justice Holmes thought that "when property outside the state is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used." Of course if the doctrine of *Union Transit Co. v. Kentucky* should be carried so far as to immunize all tangible property abroad from both property and transfer taxation, then it might well be held that such property is exempt for all purposes. Moreover, it may be hoped that the law will take such a direction. But in the light of actual decisions is it sound to conclude that *any* valuation of foreign property to determine the rate of taxation is an attempt to accomplish indirectly with "ulterior purpose" what is beyond the "constitutional power"? An affirmative answer would deprive the practice of taxing foreign wealth, or its transfer, at the domicile, of its only sound theoretical foundation. For why is not a tax at the domicile when based in part on foreign wealth as much a tax on such wealth by indirection as is a privilege tax similarly assessed against a non-resident? That theory is best which without resorting to fictions may be reconciled with the most decisions which are still law. The majority view that "property not in itself taxable by the State may be used as a measure of the tax imposed" seems the more workable. The purpose and effect of the New Jersey statute was to prevent beneficiaries of non-resident decedents from escaping the increased rates on larger bequests.²⁰ Consequently the decision does not seem objectionable.²¹ Only when taxation measured by wealth is carried beyond the line of fairness should it be upset, and then not as being in substance a levy on something beyond the jurisdiction, but as being so unreasonable and out of proportion to the benefits conferred as to be a denial of due process and the equal protection of the laws.²²

PROHIBITION AND THE WAR POWER. — Since the time of Chief Justice Marshall's illuminating comments as to the branches of the government in whose province political questions lie,¹ there would seem to have been reason for the assumption that in such an exclusively political question as whether or not the country is still at war the Supreme Court would be reluctant to interfere with the legislative and executive decision. The

The leading New Jersey case under the law as amended is *Maxwell v. Edwards*, 89 N. J. L. 446, 99 Atl. 207 (1916).

²⁰ For an illustration of the method of the New Jersey law see *Maxwell v. Edwards*, 90 N. J. L. 707, 101 Atl. 283 (1917).

²¹ The law was also attacked as a denial of privileges and immunities under Article IV, Sec. 2, of the Federal Constitution. On this question see *Ward v. Maryland*, 12 Wall. (U. S.) 418 (1870); *State v. Lancaster*, 63 N. H. 267 (1884); *Wiley v. Farmer*, 14 Ala. 627 (1848); *Board of Education v. Illinois*, 203 U. S. 553 (1906); *Travellers' Ins. Co. v. Connecticut*, 185 U. S. 364 (1902); *Estate of Mahoney*, 133 Cal. 180, 65 Pac. 309 (1901); *Estate of Johnson*, 139 Cal. 532, 73 Pac. 424 (1903); *Maxwell v. Edwards*, 89 N. J. L. 446, 99 Atl. 207 (1916).

²² *People ex rel. Farrington v. Mensching*, *supra*. See, on the general subject of this note, Thomas Reed Powell, "Extra-territorial Inheritance Taxation," 20 COL. L. REV. 1.

¹ *Luther v. Border*, 7 How. (U. S.) 1 (1849).

dissent of four justices in a case upholding the constitutionality of the Volstead Act² comes as a somewhat staggering blow to what was thought a basic conception of our governmental system.

The upholding of the War-Time Prohibition Act³ seemed only a well-advertised illustration of the division-of-powers principle. It seemed quite clear that Congress did not overstep the boundaries of its discretion when it decided that the declaration of an armistice did not mean that the war emergency was over, and that preventing the grain of the country from being made into liquor was one way of meeting that emergency. But the court conceded, for the purposes of the case, that the continued validity of the act might depend upon whether or not it appeared to the court that its necessity still existed. The meaning of that concession became evident when three of the four dissenting justices in *Ruppert v. Caffey*⁴ based their dissent on the ground that, in their opinion, when the act was passed the necessity had ended.

Other questions raised in that case present no difficulty. A state statute providing for prohibition without compensation has been upheld on the ground that the restriction of use is not a taking of property;⁵ the restriction in the Volstead Act, moreover, was not permanent, for at the time of the passage of the act there was nothing to show that the war would not end and demobilization be completed before the Eighteenth Amendment took effect. Mr. Justice Brandeis shows that eighteen states have enacted that a malt beverage containing one half of one per cent alcohol is intoxicating as a matter of law; state legislation prohibiting the sale of a beverage which may be innocuous in itself has been upheld,⁶ and, apart from the constitutionality of national prohibition, certainly the court could not say that a method of achieving prohibition reasonable for a state is unreasonable for the nation. As for the constitutionality of national prohibition itself, the court was unanimous in upholding the War-Time Prohibition Act; the least the *Hamilton* case⁷ can stand for is that, if the war emergency exists, prohibition is a constitutional way of meeting it. The real issue in *Ruppert v. Caffey*, then, is clear — is it for the court to decide whether or not the war emergency has passed?⁸

² *Ruppert v. Caffey*, U. S. Sup. Ct. No. 603, October Term, 1919. The armistice with Germany was signed on November 11, 1918. The War-Time Prohibition Act, providing that after June 30, 1918, until the conclusion of the war and the termination of mobilization, the date to be proclaimed by the President, it should be unlawful to sell for beverage purposes any distilled spirits, was approved on November 21, 1918. The Volstead Act, providing that the War-Time Prohibition Act should include any liquors containing in excess of one-half of one per cent alcohol, was enacted on October 28, 1919, over the President's veto.

³ *Hamilton v. Kentucky Distilleries and Warehouse Co.*, *Dryfoos v. Edwards*, U. S. Sup. Ct. Nos. 589 and 602, October Term, 1919.

⁴ *Supra*, note 2.

⁵ *Mugler v. Kansas*, 123 U. S. 623 (1887). The court, in construing the Fourteenth Amendment, has often referred to cases under the Fifth; Mr. Justice Brandeis, in his opinion in the *Hamilton* case, inverts the process.

⁶ *Purity Extract Co. v. Lynch*, 226 U. S. 192 (1912).

⁷ *Supra*, note 3.

⁸ Mr. Justice McReynolds, in his dissenting opinion, says, "The power of Congress recognized in *Hamilton, Collector, etc.* . . . should be restricted to actual necessities consequent upon war. . . . Whether these essentials existed when a measure was enacted or challenge presents a question for the courts."

Of all questions of fact, it would seem that this is peculiarly appropriate for Congress, and peculiarly inappropriate for the court.⁹ Mr. Justice McReynolds, in his dissenting opinion, attempts to draw a distinction between the scope to be allowed Congress in the exercise of an express power and that to be allowed it in the exercise of an implied power. That attempted distinction Mr. Justice Brandeis effectively explodes. In the first place, it is hard to see why the power to pass acts for the carrying on of war is not expressly given to Congress;¹⁰ in the second, assuming the power is only implied, the question of whether the power is there because the Constitution says it exists, or because the court says the Constitution must mean that it exists, is only a preliminary one—given the existence of the power, the court has only one standard for deciding how far it goes.

Whether peace has come is not a question of fact but a question of expediency; not a fact, but the way facts should be met, is involved. With our troops in Siberia and on the Rhine, with the economic life of the country and of the world still profoundly disorganized, the situation at the time *Ruppert v. Caffey* was decided shows the wisdom of making the absence of Presidential proclamation or Congressional resolution conclusive. But the significance of the dissent in *Ruppert v. Caffey* is much more startling. By the narrow margin of a single vote the court has repudiated a doctrine which, applied, might make an error of the justices in prophesying the outcome of an armistice result in irreparable disaster.

“MOVABLE EFFECTS” AND STATUTORY INTERPRETATION. — The American courts have given but little conscious recognition to the competing methods of statutory interpretation which have called forth much controversy on the continent of Europe in recent years.¹ Rarely, indeed, is recognition given to the view that different modes of interpretation may lead to diverse conclusions in the decision of a particular case. Owing, perhaps, to the fact that the courts are unwilling to recognize that judicial interpretation of statutes involves, by and large, a certain amount of judicial law-making, the theory of statutory interpretation in American law has not received the critical and systematic treatment which has been given to other parts of the law.

The case of *Estate of Castle*² is a recent example. Here the court was

⁹ In *Martin v. Mott*, 12 Wheat. (U. S.) 19 (1827), it was held that, under an act of Congress passed under its constitutional power to provide for the calling forth of the militia, giving the President power to call forth the militia in an emergency, not only was the action of the President in calling it out not reviewable, but the avowry was not defective in not stating that the emergency existed.

¹⁰ “The Congress shall have power to declare war . . . to raise and support armies, . . . to provide and maintain a navy . . . and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.” Art. I, Section 8, of the Constitution.

¹ See Roscoe Pound, “Enforcement of Law,” 20 GREEN BAG, 401. For more extended discussions of the subject, see GENY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF, 2 ed., Paris, 1919; SCIENCE OF LEGAL METHOD (The Modern Legal Philosophy Series, Vol. IX), Boston, 1917, Part I.

² 25 Hawaii, 38 (1919).